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Penitentials and canonical authority

INTRODUCTION

The manuscript *Biblioteca Apostolica Vaticana*, Vat. lat. 1339 contains a copy of one of the major south Italian canon law collections of the eleventh century, the *Collection in Five Books*. The collection is preceded by a series of pictures representing the six ecumenical councils and the church fathers who contributed to the collection. Among the fathers depicted are two of the important authors of handbooks for confessors or penitentials, Archbishop Theodore of Canterbury (†690) and the Irish abbot Cummean (ca. 650).¹ In the first half of the eleventh century, these authors were evidently held in the highest esteem in south Italian canonistic circles. This is all the more remarkable because some of the distinguished leaders of the so-called reform of the eleventh century, for example Peter Damian, openly criticised the use of penitentials in pastoral care, primarily because they considered these texts apocryphal and of poor authority. Such a critique was not new, since the reformers partly repeated the criticisms of Carolingian bishops who had already rejected the penitentials in the early ninth century. The problem of the authority of penitentials is therefore a recurrent theme in the history of penance. This article examines the motives for criticising penitentials by taking into account the reformers' concept of authority and the role which authority played in the penitentials themselves. Did the criticism of the Carolingians and Gregorians change over the course of time? Did it affect the transmission of old penitentials and the compilation of new ones? In order to examine how compilers of penitentials dealt with the authority of their canons, this article mainly focuses on Italy, where, unlike other regions, the genre of penitentials enjoyed a late flourishing from the eleventh well into the twelfth century.

LAW AND AUTHORITY

The rules that defined Christian identity were based on a corpus of authoritative texts. The early Middle Ages witnessed a process of selection of texts that would later constitute that corpus. The sorting out of an authoritative body of law was a highly complicated matter. From late antiquity onwards, a massive body of canon law had been produced which had resulted in a corpus of regulations that were often conflicting and discordant. This problem was recognised in Isidore of Seville's influential (but possibly apocryphal) letter to bishop Massona in which he explains that in the event that the sentences in the conciliar enactments are discordant those canons are to be observed which are of "older or more powerful authority".² Perhaps inspired by this letter, the preface of the 'B

¹ On these pictures see Edward B. Garrison, *Studies in the history of mediaeval Italian painting* 4 (Florence 1962) 235–243; Roger E. Reynolds, *Rites of separation and reconciliation in the early Middle Ages*, in: *Segni e riti nella chiesa altomedievale occidentale* 1 (Settimane di studio del centro Italiano di studi sull'alto medioevo 33, Spoleto 1987) 405–433. The other manuscripts that preserve a complete copy of this collection are Montecassino, *Archivio dell'Abbazia* 125 (Montecassino, s. XI) and Roma, *Biblioteca Vallicelliana* B. 11 (Sant'Eutizio, s. XI).

² Isidorus Hispalensis ad Massonam, PL 83, 899–902: ... *ut quotiescunque in gestis conciliorum discors sententia invenitur, illius concilii magis teneatur sententia, cujus antiquior aut potior exstat auctoritas*. On this letter see Roger E. Reynolds, *The "Isidorian" Epistola ad Massonam on lapsed clerics: Notes on its early manuscript and textual transmission*, in: *Grundlagen des Rechts. Festschrift für Peter Landau zum 65. Geburtstag*, ed. Richard H. Helmholz/Michael Stolleis (Rechts- und Staatswissenschaftliche Veröffentlichungen der Görres-Gesellschaft 91, Paderborn/München/Wien/Zürich 2000) 77–92.

version' of the Irish collection of canons known as the *Collectio Hibernensis* states that if the texts are conflicting one should prefer the most authoritative one.³ These texts, however, do not make clear which canons possessed the greatest authority and how one could recognise such a canon. The question of authority gained momentum in the ninth century, when Carolingian bishops wished to return to the ancient canons.⁴ Eleventh-century reformers, basing themselves on a ninth-century collection of forged papal letters, the so-called Pseudo-Isidorian decretals, reformulated this idea of authoritative law and set forth the idea that all law had to be in accordance with papal decrees.⁵

AUTHORITY AND THE EARLY PENITENTIALS

The early Irish and Anglo-Saxon penitentials

Penitentials are lists of both sins and vices and their appropriate penances, sometimes preceded by an introduction that reminded priests of their pastoral duties, or by liturgical directions for hearing confession. Priests could use these texts in order to enjoin a suitable penance on a sinner who came to confession.⁶ Penitentials deal with subjects like homicide, adultery and fornication, incest, perjury, drunkenness, avarice, gluttony, and questions concerning food and the eucharist. Penitentials belonged to a system of private or secret penance that developed in Irish and Welsh monasteries in the sixth century.⁷ The penances that were deemed necessary for the remission of sins usually consisted of periods of fasting. Sometimes other, often less 'secret' penances were imposed, such as pilgrimages, almsgiving, genuflections, and the singing of psalms. Canons of penitentials are formulated in a pattern which can be exemplified by the following text taken from the penitential of Columbanus. "If one has committed perjury, then one shall do penance for seven years and never

³ Preface of the *Collectio Hibernensis*: *Incipit gratissima canonum collatio, quae scripturarum testimoniis et sanctorum dictis roborata legentes letificat, ubi si quidpiam discordare uidetur, illud ex eis eligendum est, quod maioris auctoritatis esse decernitur* (ms. Roma, Bibl. Vallicelliana T. XVIII, fol. 59; ed. Friedrich W.H. Wasserschleben, *Die Irische Kanonensammlung* [Leipzig 1885] 1).

⁴ They had in mind the conciliar decrees and papal letters of late antiquity. On the Carolingian interest in authoritative canon law see Hubert Mordek, *Kirchenrechtliche Autoritäten im Frühmittelalter*, in: *Recht und Schrift im Mittelalter*, ed. Peter Classen (Vorträge und Forschungen 23, Sigmaringen 1977) 237–255. See also Horst Fuhrmann, *Einfluß und Verbreitung der pseudo-Isidorischen Fälschungen I* (MGH Schriften 24, 1, Stuttgart 1972) 143: "Trotz dieser neuen Sammlungen has es so etwas wie eine kirchliche Rechtswissenschaft in der Karolingerzeit nicht gegeben."

⁵ See Kathleen G. Cushing, *Papacy and Law in the Gregorian Revolution: The Canonistic Work of Anselm of Lucca* (Oxford 1998) 45f. See for instance Bernold von Konstanz, *De excommunicatis vitandis, de reconciliatione lapsorum et de fontibus iuris ecclesiastici*, libellus X (ed. Doris Stöckly, MGH *Fontes iuris Germanici antiqui in us. schol. separatim editi* 15, Hannover 2000) 120f.: *Ecclesiasticarum regularum institutiones partim ab ipsis apostolicis accepimus, partim a Romanis pontificibus, partim ab aliis sanctis patribus, quorum tamen iudicia Romani pontifices firmaverunt*. Some theorists argued that all canon law required papal ratification, others maintained that canon law only had to be in accordance with papal decrees ("theory of consonance"), see J. Joseph Ryan, *Saint Peter Damiani and His Canonical Sources* (Pontifical Institute of Mediaeval Studies, *Studies and texts* 2, Toronto 1957) 137–148.

⁶ This paragraph is mainly based on Rob Meens, *Het tripartite boeteboek. Overlevering en betekenis van vroegmiddeleeuwse biechtvoorstellingen*. *Middeleeuwse studies en bronnen* 41 (Hilversum 1994) 11–72; Raymund Kottje, *Bußpraxis und Bußritus*, in: *Segni e riti nella chiesa altomedievale occidentale I* (Settimane di studio del centro italiano di studi sull'alto medioevo 33, Spoleto 1987) 369–395.

⁷ In contrast to the old public penance, this form of penance allowed Christians to make their confessions in secret to the priest; there was no public ritual. Furthermore, Christians could confess and expiate their sins as frequently as they wanted, whereas canonical penance only allowed a once-in-a-lifetime penance. In private penance priests were qualified to hear confession and to impose penance, while in the old system, bishops were the only ones to administer the sacrament of confession. Mayke de Jong, however, warns us not to overstress the differences between secret and public penance and points to the similarities between the two systems, see Mayke de Jong, *What was public about public penance? Paenitentia publica and justice in the Carolingian period*, in: *La giustizia nell'alto medio evo (secoli IX–XI)* 2 (Settimane di studio del centro italiano di studi sull'alto medioevo 44, Spoleto 1997) 863–902. She also prefers the term 'secret penance' instead of 'private penance'. The latter term was not in use until the end of the tenth century, when it is used in the Fulda sacramentary (ed. Gregor Richter/Albert Schönfelder, *Sacramentarium Fuldense saeculi X: Cod. theol. 231 der K. Universitätsbibliothek zu Göttingen: Text und Bilderkreis*, Fulda 1912; repr. as *Henry Bradshaw Society* 101, Farnborough 1982) 42.

afterwards take an oath".⁸ In later ages, penitentials could also take on the form of a questionnaire in which the canons were cast as interrogative sentences.⁹ The earliest penitentials were composed in the British isles in the late sixth and seventh centuries. Irish and Anglo-Saxon missionaries or *pergrini* brought these texts to the continent where new texts, although partly based on the insular ones, were compiled in the eighth century.

The compilers of these early insular penitentials did attach some importance to the authority of their sources. Cummean, Finnian, and Columbanus refer in their prefaces to "ancient fathers" or "very wise men" on whom they base their own rulings. Although these remain unnamed, the sources of the texts suggest that the Scriptures, the Irish synods, early penitential texts such as the Paenitentiale Ambrosianum, and the writings of Cassian and Caesarius of Arles are meant. Finnean notes that he wrote down a few things concerning penance according to the pronouncements of the Scriptures and "very wise men" but he admits that any "searcher of the divine reading" may find more or write better things.¹⁰ The earliest penitential that was compiled in Anglo-Saxon England was that of Theodore of Tarsus, the archbishop of Canterbury (†690), who was sent to England by pope Vitalianus to reorganise the English church. His sentences were collected in five different recensions which traveled under his own name as well as under that of pope Gregory.¹¹ The most widely distributed version of his canons was compiled by an anonymous *Discipulus Umbrensius* who mentions that a certain priest Eoda handed over to him this collection of Theodore's judgments supplemented with canons which Theodore had taken from an Irish penitential (*ex Scottorum libello*).¹² The sentences of Theodore regularly contain allusions to other sources.¹³ Furthermore, knowledge of Theodore's mission as a papal legate may have enhanced his authority and probably ensured the incorporation of his judgments in various canon collections, although his canons were, as we will see, liable to criticism from the eleventh-century reformers.¹⁴ The preface of the eighth-century penitential that

⁸ P. Columbani B 5 (ed. Ludwig Bieler, *The Irish penitentials, with an appendix by D.A. Binchy (Scriptores Latini Hiberniae 5, Dublin 1975) 100: Si quis periurauerit, vii annis paeniteat et numquam iuret postea.*

⁹ Many different interrogatories can be found, but the most important ones are those of Burchard of Worms (*Corrector sive medicus*) and Regino of Prüm. An early interrogatory is that of the P. Mixtum Bedae-Egberti which was later inserted into the Pontificale Romano-Germanicum, ordo 136 (ed. Cyrille Vogel/Reinhard Elze, *Le Pontifical Romano-Germanique du dixième siècle 2, Studi e Testi 227, Rome 1963) 237–240*. A short and concise form of this text is found in tenth-century manuscripts, see Karijn M. Delen/Adriaan H. Gaastra/Marjolijn D. Saan/Barbara Schaap, *The Paenitentiale Cantabrigiense*. A witness of the Carolingian contribution to the tenth-century reforms in England, in: *Sacris Erudiri. A Journal on the Inheritance of Early and Medieval Christianity 41 (2002) 341–373*, at 347–348.

¹⁰ The epilogue of the P. Vinniani, ed. Bieler 92–95: ... *secundum sententiam scripturarum uel opinionem quorundam doctissimorum pauca de penitentiae remediis... temptaui scribere... Sunt praeterea aliaque uel de remediis aut de uarietate curandorum testimonia, quae nunc breuitatis causa... non silit nos ponere. Sed si qui diuine lectionis scrutator ipse magis inueniat aut si proferet meliora uel scriperet, et nos consentimus et sequeremur*. Columbanus explains that he "set out a few things according to the traditions of the elders and partially according to our own understanding"; P. Columbani, ed. Bieler 98: ... *pauca iuxta seniorum traditiones et iuxta nostram ex parte intelligentiam... aliqua proponamus*. See also A. J. Frantzen, *The Literature of Penance in Anglo-Saxon England (New Brunswick 1983) 20–35*.

¹¹ The D and Co versions of Theodore's judgments are attributed to *Theodori Greci et episcopi Saxonum* and *Theodori episcopi*. The 'G version' is usually attributed to Gregory (*Gregorius papa urbis Romae*) but in some manuscripts to Theodore, as for instance in the Italian manuscripts Città del Vaticano, BAV, Vat. lat. 5751, Roma, Bibl. Vallicelliana T. XVIII, and Montecassino, Archivio dell'Abbazia 372, p. 120–124: *Theodorus archiepiscopus*). The 'U version' mentions the 'Venerable Theodore, archbishop of the English'. The *Canones Basiliensis* are not attributed to any author, see Franz B. Asbach, *Das Poenitentiale Remense und der sogen. Excarpus Cummeani: Überlieferung, Quellen und Entwicklung zweier kontinentaler Bußbücher aus der 1. Hälfte des 8. Jahrhunderts (Regensburg 1979) 79–89 (Anhang)*.

¹² P. Theodori U, preface (ed. Paul W. Finsterwalder, *Die Canones Theodori Cantuariensis und ihre Überlieferungsformen, Untersuchungen zu den Bußbüchern des 7., 8. und 9. Jahrhunderts 1, Weimar 1929) 287*. The disciple reports that Theodore handed over his canons to Eoda at his request.

¹³ Allusions to Dionysius Areopagita, Basil the Great, Augustine, Gregory of Nazianzen, pope Innocent I, and the Council of Nicaea can be found in the U version: I, 3, 3; I, 8, 14; II, 4, 3; II, 4, 4; II, 4, 6; II, 5, 8–9; II, 7, 4; II, 12, 6, ed. Finsterwalder 285–334.

¹⁴ See for instance Hrabanus Maurus' letter on illicit marriages to Humbert of Wurzburg: Hrabanus Maurus, *Epistola 29* (ed. Ernst Dümmler, MGH EE 5, 3, Berlin 1899) 444–448, at 446f: *Hunc autem Theodorum Tharso Ciliciae natum Vitalianus papa Romae episcopum ordinans ad Britannium misit, unde et tam orientalium quam occidentalium ecclesiarum consuetudinibus pleniter institutus fuerat...*

is attributed to bishop Egbert of York more specifically mentions sources of authority.¹⁵ The compiler indicates that he compiled his work from the sayings of the Apostles, the holy fathers and Penulfius (Paphnutius). He also counts Jerome, Augustine, Gregory and Theodore among the authorities that he had consulted for his compilation.¹⁶ The earliest handbooks that were compiled on the Continent are the so-called simple Frankish penitentials of the eighth and early ninth centuries. They are primarily made up of canons taken from Columbanus' penitential and from conciliar decrees. Like their Insular counterparts, these texts, which are all transmitted anonymously, only incidentally refer to "decrees of the fathers" or "judgments... *ex canonica auctoritate sumpta*".¹⁷

The collections these authors composed should rather be conceived of as guidelines for confessors than as legal codes. The penances were to be applied according to the power of discernment (*discretio; providentia*) of the individual priest, who was encouraged to take into careful account the conditions under which sins were committed and the status (age; health; social status) of the sinner.¹⁸ The compilers of the penitential handbooks were to some extent concerned with the authority of the canons. As can be seen in the prologues, they were anxious to proclaim their indebtedness to the Scriptures and the wisdom of their predecessors. They clearly saw themselves as part of a tradition. However they did not shy away from assigning to themselves or to their readers the possibility to elaborate on previous collections or to make their own collections. Authors such as Finnian did not regard their own work as authoritative in all matters. Apparently, the texts of the elders were seen as useful guidelines, but not as binding judgments.

The Paenitentiale Oxoniense II and the Tripartite penitentials

A later eighth-century penitential demonstrates that compilers did not always uncritically accept the canons of their predecessors. The prologue of the anonymous eighth-century Paenitentiale Oxoniense II, which is known as the instruction *Quomodo debent*, urged priests to judge with *miserordia*.¹⁹ Appealing to the New Testament, this text declares that the severe penances decreed by the *antiqui beatissimi patres patriarchi*, which, according to Ludger Körntgen, denoted the authors of older penitentials, need to be replaced by new ones, because "the penitents do not readily come to penance if we judge them too harshly".²⁰ Although the *beatissimi patres* are extensively praised, the author

¹⁵ A thorough survey of the manuscript transmission of the penitentials attributed to Bede and Egbert can be found in Reinhold Haggenmüller, *Die Überlieferung der Beda und Egbert zugeschriebenen Bußbücher* (Europäische Hochschulschriften 3, Frankfurt am Main/Bern/etc. 1991). Haggenmüller calls into question the authorship of Egbert and Bede as well as the insular origin of these texts.

¹⁶ P. Ps.-Egberti, preface (ed. Hermann J. Schmitz, *Die Bussbücher und das kanonische Bussverfahren. Nach handschriftlichen Quellen dargestellt* 2 [Mainz 1898]) 661–663.

¹⁷ See the P. Sangallense simplex and the P. Hubertense (ed. Raymund Kottje, *Paenitalia minora Franciae et Italiae saeculi VIII–XI*, CC SL 156, Turnhout 1994) 107 and 119. The P. Floriacense and the P. Oxoniense I mention Theodore, the council of Ancyra and Basil the Great in their rubrics (ed. Raymund Kottje, CC SL 156, Turnhout 1994) 89 and 102f.

¹⁸ This is particularly stressed by Pierre J. Payer, *Humanism of the penitentials and the continuity of the penitential tradition*, in: *Mediaeval Studies* 46 (1984) 340–354. See the preface of the Paenitentiale Ps.-Egberti, ed. Schmitz 2, 661–663.

¹⁹ The P. Oxoniense II is assigned to the council of Nicaea in the manuscript Oxford, Bodleian Library Bodley 311, fol. 65r, which contains its only complete copy (*Incipit concilio penitentiae, haec est qui iudicauerunt CCCXVIII sancti patres episcopi in concilio niceno per auctoritate domini nostri iesu christi, qui post baptismo peccauerunt*). It is unknown who – the copyist or the author of the P. Oxoniense II – was responsible for this attribution. Perhaps it was added to enhance the authority of the text. See Ludger Körntgen, *Studien zu den Quellen der frühmittelalterlichen Bußbücher* (Quellen und Forschungen zum Recht im Mittelalter 7, Sigmaringen 1992) 112.

²⁰ Prologue of the P. Oxoniense II (ed. Raymund Kottje, CC SL 156, Turnhout 1994) 181f.: ... *quod grauitur eos indicamus, non facilem accedunt ad poenitentiam. Ideo qui non graue pondus inponamus eis ieiunium, quia ipse saluator noster Iesus Christus ueniens in huc mundum non graue pondus, sed leue iugum suae misericordia super nos inposuit*... See also Körntgen, *Studien* 121–130 and 139f. The instruction *Quomodo debent* circulated as a separate text in Italy. Körntgen lists four manuscripts that contain this preface. The manuscript Montecassino, Archivio dell'Abbazia 372, p. 58–59, in which the preface is appended to the P. Casinense, can be added to this list.

makes clear that their judgments were in his days simply too severe to be implemented. The penances of this text are reckoned in weeks and are much shorter than those of other penitentials. It seems that the P. Oxoniense II bears witness to a more detached approach to the old texts, which are regarded as products of their time.²¹

Already from the eighth century onwards the authority of the canons evidently became more important, which is attested by the fact that compilers of the Frankish tripartite penitentials, which incorporated the canons of the simple Frankish texts, the penitential of Theodore and that of Cummean, were far more inclined to attribute their canons to authoritative sources. The rubrics of the so-called *Excarspus Cummeani* occasionally refer to Theodore of Canterbury, a 'Roman penitential', and the council of Ancyra.²² The canons which are classified as 'Roman' were in fact derived from one of the collections of sentences of Theodore. The compilers of two near-contemporary penitentials, the Tripartite Saint Gall penitential and the *Capitula Iudiciorum*, subdivided their canons into *Iudicia Canonica*, *Iudicia Cummeani*, and *Iudicia Theodori*.²³ The north Italian compiler of the P. Vallicellianum I, an early tenth-century recension of the late eighth-century P. Merseburgense A, corroborated the authority of his canons by assigning them to ancient synods.²⁴ The penitentials that continued to be copied in the later ninth and tenth century, such as, for example, Halitgar's penitential and the penitentials attributed to Bede and Egbert, were all ascribed to well-known authors. The transmission of many older penitentials like the simple Frankish ones came to an end in the course of the ninth century.

PENITENTIALS AND THE CAROLINGIANS

The Carolingian church councils

Authority seems to have played a more prominent role from the late eighth century onwards. In the case of Theodore's penitential, the various names under which it was known may have caused confusion. Now one could find its canons transmitted under his own name, under the name of Gregory the Great, and, in the P. Remense and *Excarspus Cummeani*, under the heading 'Roman penitential'. Such confusion probably alarmed the reforming bishops of the Carolingian period who wanted to revive the old public penance put forth by the ancient canons. Hence they put the poor authority of the anonymous penitentials on the conciliar agenda. The council of Chalon-sur-Saône (813) branded the penitentials unauthoritative, because many penitential books traveled under the name of different authors, they were not supported by authority, and at the same time canons prescribed different penances for the same sin. The errors of the penitentials were obvious but the authors uncertain (*certi errores incerti auctores*), according to this council.²⁵ The council of Paris (829)

²¹ This approach foreshadows eleventh-century theories of law. Thus pope Urban II explained that "many things leaders of the church judge more strictly according to the text of the canons, many things they patiently tolerate according to the necessity of times and the quality of the persons involved" (*pro temporum necessitate... pro personarum qualitate*). See Robert Somerville/Stephan Kuttner, *Pope Urban II, the 'Collectio Britannica', and the Council of Melfi (1089)* (Oxford 1996) 104–115.

²² See the *Excarspus Cummeani* (ed. Hermann J. Schmitz, *Die Bussbücher und das kanonische Bussverfahren. Nach handschriftlichen Quellen dargestellt* 2 [Mainz 1898]) 597–644.

²³ Both texts are printed in Meens, *Het tripartite boeteboek* 326–485.

²⁴ The compiler borrowed his rubric from the *Collectio Herovalliana*. See Hubert Mordek, *Kirchenrecht und Reform im Frankenreich. Die Collectio Vetus Gallica, die älteste systematische Kanonensammlung des fränkischen Gallien* (Studien und Edition. Beiträge zur Geschichte und Quellenkunde des Mittelalters 1, Berlin/New York 1975) 131, nr. 154; Gunther Hägele, *Das Paenitentiale Vallicellianum I. Ein oberitalienischer Zweig der frühmittelalterlichen kontinentalen Bußbücher* (Quellen und Forschungen zum Recht im Mittelalter 3, Sigmaringen 1984) 79.

²⁵ Council of Chalon (813) 25 (ed. Albert Werminghoff, *MGH LL 3, Concilia 2, 1, Hannover/Leipzig 1906*) 278: *Paenitentiam agere iuxta antiquam canonum constitutionem in plerisque locis ab usu recessit, et neque excommunicandi neque reconciliandi antiqui mores ordo seruat*. Canon 38, ed. Werminghoff 281: *Modus autem paenitentiae peccata sua aut per antiquorum canonum institutionem aut per sanctorum scripturarum auctoritatem aut per ecclesiasticam consuetudinem, sicut superius dictum est, imponi debet, repudiatis ac penitus eliminatis libellis, quos paenitentiales uocant, quorum sunt certi errores, incerti auctores...*

decreed that the penitentials “should be abolished entirely, since they are opposed to the authority of the canons”. The bishops were ordered to find and to burn these books.²⁶ The councils were not opposed to secret penance or the genre of penitentials as such, but only to the anonymous ones. As for the re-introduction of public penance, the bishops introduced the so-called Carolingian dichotomy – secret penance for secret sins, public penance for crimes that had offended the community as a whole.²⁷ Although this legislation proved to be influential, we will see that the immediate impact on the transmission of penitentials was limited.²⁸

Halitgar of Cambrai and post-Carolingian penitentials

Many of the bishops’ complaints were enumerated in bishop Ebbo of Reims’ letter to bishop Halitgar of Cambrai (ca. 832). He noted that many of the penitential judgments found in the *opuscula* of his priest were “confusing” and “diverse”, i.e. there were contradictions between the various texts and the canons were not supported by authority.²⁹ He therefore asked Halitgar to produce a new penitential handbook that would consist of canons of impeccable authority.³⁰ In reply, the bishop of Cambrai prepared for him a six book penitential consisting of “the sentences of the holy fathers and canons”. Apart from the fact that he indicates which sources he used for the first three books, he also carefully provides attributions in the rubric of each separate canon.³¹ But since many canons (the papal and canonical ones?) do not lay down precise penances for each and every sin, he states that the imposition of penance should be left at the priest’s discretion.³² Nevertheless, those who found the canons of the first five books “superfluous” or were unable to find there what they wanted, could turn to the sixth book. This was a penitential in the old style that, according to Halitgar, he had taken from the archives of the Roman church (*ex scrinio Romane ecclesie*), but which was in fact compiled from Insular and Frankish penitential sources, either by Halitgar himself or by an anonymous compiler.³³ In his preface he grudgingly states that it is meant for “the simple (*simpli-*

²⁶ Council of Paris (829) (ed. Albert Werminghoff, MGH LL 3, Concilia 2, 2, Hannover/Leipzig 1908) 633: *Ut codicelli, quos penitentiales uocant, quia canonicae auctoritati refragantur, poenitus aboleantur... unusquisque episcoporum... erroneos codicellos... inventos igni tradat*. The attitude towards penitentials was adopted by the episcopal capitularies, see Ludger Körntgen, Burchards “Liber Corrector” und seine Quellen, in: Bischof Burchard von Worms, 1000–1025, ed. Wilfried Hartmann (Quellen und Abhandlungen zur mittelhochdeutschen Kirchengeschichte 100, Mainz 2000) 199–226, at 205.

²⁷ See Rob Meens, *Paenitentia publica en Paenitentia Privata*. Aantekeningen bij de oorsprong van de zogeheten Karolingische dichotomie, in: Die Fonteyn der ewiger Wijsheit. Opstellen aangeboden aan prof. dr. A.G. Weiler ter gelegenheid van zijn 25-jarig jubileum als hoogleraar, ed. Petty Bange/P.M.J.C. de Kort (Nijmegen 1989) 65–73. He traces the so-called Carolingian dichotomy back to the late eighth century.

²⁸ According to Mordek, *Kirchenrechtliche Autoritäten im Frühmittelalter* 246f. and 253f., diversity of canon law still prevailed in Carolingian attitudes to law in spite of the growing concern for authoritative law in the early Carolingian period.

²⁹ The letter precedes the preface of Halitgar’s penitential, PL 105, 652f.: *Et hoc est quod hac in re me valde sollicitat quod ita confusa sunt iudicia poenitentium in presbyterorum nostrorum opusculis, atque ita diversa, et inter se discrepantia, et nullius auctoritate suffulta, ut vix propter dissonantiam possint discerni*.

³⁰ P. Halitgarii, preface, PL 105, 652: *Idcirco, ut tecum contuli, ex patrum dictis, canonum quoque sententiis, ad opus consacerdotum nostrorum excerpere paenitentialem minime ualui... Arripe quaeso sine excusationis uerbo huius sarcinae pondus, a me quidem impositum...*

³¹ For the first book he used *remediis quem de libris Gregorii, Augustini, necnon prosperi excerpimus*, for the second book he mentions *dictis patrum*, and for the third book he used the decisions of church councils (P. Halitgarii, preface, PL 105, 658).

³² P. Halitgarii, preface, PL 105, 657: *Mensuram autem temporis in agenda poenitentia idcirco non satis attente praefigunt canones pro unoquoque crimine, sed magis in arbitrio antistitis relinquendum statuunt, quia apud Deum non tam valet mensura temporis quam doloris. Nec abstinentia tantum ciborum, sed mortificatio potius vitiorum*.

³³ Although this text was found in the Roman archives, Halitgar admits that he does not know by whom it was produced. On the origins and sources of the Pseudo-Roman penitential see Raymund Kottje, *Die Bußbücher Halitgars van Cambrai und des Hrabanus Maurus*. Ihre Überlieferung und ihre Quellen (Beiträge zur Geschichte und Quellenkunde des Mittelalters 8, Berlin/New York 1980) 185–190. According to Körntgen, *Studien* 224, it is unlikely that Halitgar composed the P. Ps.-Romanum himself.

cioribus) who were not capable of understanding bigger things (*majora*)”, the conciliar and papal decrees.³⁴

Halitgar’s text proved to be important in several ways. Firstly, his collection would have a wide circulation and parts of it would find their way into later canon law collections. Consequently, the problem of the authenticity of the Roman penitential would occupy canonists and scholars up to the beginning of the twentieth century.³⁵ Secondly, the penitential of Halitgar was the first text that successfully and systematically combined a penitential with a collection of conciliar and papal decrees. Although conciliar decisions incidentally appear in earlier penitential traditions, Halitgar’s text marked the beginning of a process of incorporation of penitentials and their canons into canon law.³⁶ This entailed a growing concern for authoritative attributions of canons. Perhaps in imitation of Halitgar’s preface, some compilers expressed their concern about the *diversitas* and *confusio* which characterised so many handbooks for confessors. The so-called Pseudo-Gregorian penitential of the ninth century, for instance, clearly belongs to the Carolingian period, but it also echoes many themes that had already been taken up by the P. Oxoniense II.³⁷ While its preface paraphrases the complaints recorded in the penitential of Halitgar of Cambrai, its canons, which were mainly derived from the penitentials and church councils, only incidentally refer to the authority of their sources. What makes this penitential remarkable is its reference in some of the canons to both the old penances (*secundum antiquam definitionem*) and the new and more humane ones (*secundum humaniorem definitionem*) for some sins.³⁸ This procedure led the compiler to denounce as ridiculous (*ridiculosum*) a canon which assigned a penance to those who touch or kiss a woman out of lust, a view justified by a comparison with a decision of the council of Neocaesaraea.³⁹ Pseudo-Gregory does not only direct his criticisms against the authority of penitentials, but rather tries to challenge the harshness of their penances. Furthermore, like the P. Oxoniense II this text testifies to what we might call an awareness of the historicity of the older canons. Pseudo-Gregory conceived of their terrifying penances as products of ancient times, which needed to be replaced by more merciful ones.

Regino of Prüm’s episcopal handbook (ca. 906) is not specifically concerned with penitentials and their authority, but expects priests to possess copies of either the Roman penitential, that of Bede, or that of Theodore of Canterbury.⁴⁰ His handbook also includes detailed prescriptions for priest-

³⁴ P. Halitgarii, preface, ed. Schmitz 2, 266: *Sextus quoque ponitur libellus de paenitentia qui non est ex labore nostre excerptiois sed adsumptus de scrinio romane ecclesiae in quo multa ac diversa continentur, que in canonibus non habentur. Tamen simplicioribus qui majora non valent capere poterit prodesse.* This text is not printed in PL 105.

³⁵ Although he admitted that the Ps.-Romanum was not a pure copy of it, the German theologian Hermann Joseph Schmitz still defended the existence of a Roman penitential in the late nineteenth century. See Hermann Joseph Schmitz, *Die Bussbücher und die Bussdisciplin der Kirche. Nach handschriftlichen Quellen dargestellt* 1 (Mainz 1883) 167–239. Paul Fournier, *Études sur les pénitentiels* I, II and III, in: *Revue d’histoire et de littérature religieuse* 6, 7 and 8 (1901, 1902, and 1903), demonstrated that the penitentials that were thought to have been Roman were in fact compiled from older Insular and Frankish exemplars. Cf. Kottje, *Die Bußbücher Halitgars van Cambrai und des Hrabanus Maurus* 185–190.

³⁶ Rob Meens, Frequency and nature of early medieval penance, in: *Handling Sin: Confession in the Middle Ages*, ed. Peter Biller/Alastair J. Minnis (York Studies in Medieval Theology 2, Woodbridge 1998) 35–61; Franz Kerff, *Libri Paenitentiales und kirchliche Strafgerichtsbarkeit bis zum Decretum Gratiani. Ein Diskussionsvorschlag*, in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kan. Abt.* 75 (1989) 23–57.

³⁷ Franz Kerff, *Das Paenitentiale Pseudo-Gregorii III. Ein Zeugnis karolingischer Reformbestrebungen*, in: *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kan. Abt.* 69 (1983) 46–63; id., *Das Paenitentiale Ps.-Gregorii. Eine kritische Edition* (ed. Franz Kerff, in: *Aus Archiven und Bibliotheken. Festschrift für Raymund Kottje zum 65. Geburtstag*, ed. Hubert Mordek, *Freiburger Beiträge zur mittelalterlichen Geschichte. Studien und Texte* 3, Freiburg 1992) 161–188.

³⁸ This is set forth by the preface, which explains that the *mensura temporis* does not sufficiently stand out in the canons and that it should be left at the *arbitrio* of the priest who should judge with *miser cordia*: P. Ps.-Gregorii, ed. Kerff 164. This passage derives from Halitgar’s penitential, which however does not mention the priest’s *miser cordia*.

³⁹ P. Ps.-Gregorii 7, ed. Kerff 171: *In canone Neocesariense ita habetur, placuit, ut si quis concupiscens mulierem, etiam si eius concupiscentia desiderium habeat, non autem subsequuntur effectus, manifestum est hunc fuisse per diuinam gratiam liberatum. Ridiculosum est ut pro tactu uel osculo et amplexu mulierum quis damnatus inueniatur.*

⁴⁰ Regino of Prüm, *Libri duo de synodalibus causis et disciplinis ecclesiasticis, Inquisitio* 96 (ed. Friedrich W.H. Wasser-schleben, Leipzig 1840) 26: *Si habeat poenitentialem Romanum vel a Theodoro episcopo aut a venerabili Beda editum, ut secundum quod ibi scriptum est, interroget confitentem, aut confesso modum poenitentiae imponat?*

confessors, including a penitential, which is said to derive from the penitentials of Theodore and Bede.⁴¹ In the preface to his highly influential canon law collection, Bishop Burchard of Worms (†1025) quotes Ebbo of Reims' letter to Halitgar almost verbatim and complains about the discordances of the canons and the poor status of the texts. Significantly, he refers to the diversity, confusion, and poor authority of the *judicia poenitentium* as well as the *canonum jura*; the problem was no longer confined to penitentials alone.⁴² Burchard still incorporated many canons taken from the penitentials in the *Decretum* and even compiled a penitential handbook (the *Corrector sive medicus*), based on Regino's interrogatory, which he added as the nineteenth book of his collection. The *Corrector* was often copied independently of the *Decretum* as a separate text and turned out to be one of the most influential penitentials of its time. It also reproduced Regino's requirement that every priest possess one penitential, which is constituted "according to the authority of the canons and according to the sentences of three penitentials, [that] of bishop Theodore, [that] of the Roman pontiffs, and [that] of Bede". On the penitential of Bede he comments that many useful things can be found in this penitential but that at the same time "many things are to be found there which are inserted by others and do not concur with other canons or penitentials".⁴³ Burchard and Regino provided priests with explicit directions concerning the penitentials to be used in pastoral care. Neither author opposed the genre of penitentials in general but rather the anonymous texts. It is, however, uncertain whether Burchard lived up to his own regulations for it has been shown that for some of his canons he did in fact draw on anonymous penitentials.⁴⁴

The Italian penitentials of the tenth and eleventh centuries

Let us now turn to Italy. Unlike other regions, Italy witnessed a remarkable production of new penitential texts in the eleventh and twelfth centuries. Many of the old anonymous penitentials, for instance the P. in II libris and the P. Oxoniense II, which ceased to be copied in the rest of Europe, still circulated in southern Italy, while the anonymous south Italian P. Vaticanum (Città del Vaticano, Archivio di S. Pietro H. 58) and P. Casinense exerted a strong influence on later Italian penitentials and canon law collections. Moreover, penitential canons appear prominently in the two major south Italian canon law collections of the eleventh century, the Collection in Nine Books and the Collection in Five Books. Preceded by several prologues of penitentials, the ninth book on penance of the former collection is made up of canons of a number of Frankish and Insular texts, such as the *Capitula Iudiciorum*, the P. Oxoniense II, the P. in II libris, the P. Theodori (Canones Gregorii version), and the P. Ps.-Gregorii.⁴⁵ Although the compiler felt no hesitation in quoting from the penitentials, his collection betrays some uneasiness about the authority of these works, for he felt

⁴¹ Regino, *De synodalibus causis* I, 301, ed. Wasserschleben 139: *Item de suscipienda confessione. Ex Theodori archiepiscopi vel Bedae presbyteri Poenitentiali*. His penitential takes the form of an interrogatory and is based on that of the P. Mixtum Ps.-Bedae-Egberti, ed. Schmitz 2, 281–283.

⁴² See Körntgen, Burchards "Liber Corrector" 210.

⁴³ Burchard of Worms, *Libri viginti decretorum* XIX, 8, PL 140, 978: *Ad haec autem suum Poenitentialem, qui et secundum canonum auctoritatem, et justa sententias trium Poenitentialium, Theodori episcopi, et Romanorum pontificum, et Bedae ordinatur. Sed in Poenitentiali Bedae plura inveniuntur utilia: plura autem inveniuntur ab aliis inserta, quae nec canonibus, nec aliis Poenitentialibus conveniunt. Sapiens autem medicus excipiat quaeque meliora, ut discretionem omnium causarum investigare possit, sine quibus rectum iudicium non potest stare.*

⁴⁴ Notably the P. Hubertense and the *Excarpus Cummeani*, see Hartmut Hoffmann/Rudolf Pokorny, *Das Dekret des Bischofs Burchard von Worms. Textstufen – Frühe Verbreitung – Vorlagen* (MGH Hilfsmittel 12, München 1991) 269–272; Körntgen, Burchards "Liber Corrector" 213 and 226.

⁴⁵ On this collection, which is only preserved in the eleventh-century manuscript Città del Vaticano, BAV Vat. lat. 1349, from southern Italy, see Paul Fournier, *Un group de recueils canoniques italiens des X^e et XI^e siècles*, in: Paul Fournier, *Mélanges de droit canonique II, Études sur les diverses collections canoniques*, ed. Theo Kölzer (Aalen 1983) 213–331; Stephan Kuttner/Reinhard Elze, *A Catalogue of Canon and Roman Law Manuscripts in the Vatican Library I, Codices Latini 541–2299* (Studi e Testi 322, Vatican City 1986) 109; Lotte Kéry, *Canonical Collections of the Early Middle Ages* (ca. 400–1140). A Bibliographical Guide to the Manuscripts and Literature (History of Medieval Canon Law 1, Washington, 1999) 196f. Because the ninth book is only partially edited in Schmitz 2, 218–251, I will refer to the manuscript.

the need to assign many of their canons to authoritative sources.⁴⁶ This invention of authority results in rubrics like *Iudicium Canonicum*, *Synodus Romana*, *Gregorius*, *Iudicium Sinodale*, *Sancta Synodus*, *Apostolicum* and *Ex decreto pontificum*. A telling example are the canons taken from the P. in II libris, which are given under various different rubrics.⁴⁷ In addition, canons which may have been composed by the compiler himself are provided with a more authoritative rubric. Although the Collection in Five Books, the other important south Italian canon law collection, considered Theodore of Canterbury and Cummean important authorities, the compiler of this collection exhibited even more creativity in making up new rubrics.⁴⁸ Canons on homicide drawn from texts like the Pseudo-Gregorian penitential and the *Capitula Iudiciorum* were enlivened with rubrics such as “the synod of Nicaea which was held by three hundred and eighteen bishops under the August Constantine”.⁴⁹ A penitential canon on theft which is recorded in the Collection in Five Books is arranged in the following way:

“But [the canons] of certain synods especially decree that no one can perfectly perform his penance, unless he has emended his ways first.”⁵⁰

After emphasising the discretion or wisdom of the confessor, the canon proceeds:

ON DISCERNMENT CONCERNING THEFT

A Roman Synod: Although we have found written in the canons of many tracts “If someone has committed a capital theft, that is, [if he has stolen] gold, silver, a horse, a cow, an ass, or if he has broken into houses, or the like, he should do penance for five years”, the following things should still be taken into account, the sinner’s personality and the quantity and quality of the sin, but in particular the sinner’s intention and state of mind (*affectus peccandi*)...

The authority of the canon is forged, since there is no Roman synod that issued this legislation. The compiler uses this rubric to justify his attempt to compare canons of various penitentials in order to emphasise the *providentia* of the *sacerdos*, his wisdom and ability to assign a penance that takes into account the nature of the crime and the sinner’s intention.⁵¹ Authority is important, but

⁴⁶ This is why Peter Landau, *Gefälschtes Recht in den Rechtssammlungen bis Gratian*, in: id., *Kanones und Dekretalen. Beiträge zur Geschichte der Quellen des kanonischen Rechts (Bibliotheca Eruditorum 2, Goldbach 1997) 3–49*, considers the eleventh century a period of forgery in his.

⁴⁷ P. in II libris I, 4, 27=Coll. 9 libr. IX, 21, 2 (*Synodus*); P. in II libris I, 4, 16 (supplemented with canons of other penitentials)=Coll. 9 libr. IX, 30, 2 (*Iudicium Canonicum*); P. in II libris I, 10, 2=Coll. 9 libr. IX, 57, 2 (*Ex decreta papae leonis*); P. in II libris II, 1, 35=Coll. 9 libr. IX, 97 (*Unde supra = Iudicium Synodale*) P. in II libris II, 7, 1–5=Coll. 9 libr. IX, 121, 2 (*Unde supra*; the earlier canon is however not attributed to a source); P. in II libris I, 10, 10=Coll. 9 libr. IX, 134, 2 (*In alio penitentiale continetur sic*). See the *incipit-explicit* edition of the P. in II libris in Körntgen, *Studien 272–279*.

⁴⁸ Roger E. Reynolds devoted many articles to the manuscript transmission of this collection, esp. Roger E. Reynolds, *The south-Italian canon law Collection in Five Books and its derivatives: new evidence on its origins, diffusion, and use*, in: *Mediaeval Studies 52* (1990) 278–295. Books 1–3 of the collection are edited in *Collectio canonum in V libris (libri I–III)* (ed. Mario Fornasari, CC CM 6, Turnhout 1970).

⁴⁹ Città del Vaticano, BAV Vat. lat. 1339, fol. 188v: *CVIII. SYNODUS NICENA, A .CCCX. ET .VIII. EPISCOPIS SUB CONSTANTINO AUGUSTO PERACTA. Qui episcopum, aut presbyterem, uel diaconum occiderit, adiudicandum est regi dimittendum...* This canon is based on P. Ps. Gregorii 3, ed. Kerff 168.

⁵⁰ This sentence possibly alludes to the third council of Toledo 12. Città del Vaticano, BAV Vat. lat. 1339, fol. 205r–v: *DE FURTI DISCRETIONE. SYNODUS ROMANA. Quamuis in multorum tractatorum canones comperimus scriptum: Si quis furtum capitale commiserit, id est, aurum, argentum, equum, bouem, asinum, necnon et domos fregerit, ac talium similia .v. annos peniteat. Tamen maxime pensandum est, persona peccantis, uel quantitas uel qualitas damni. Praecipue tamen intentio et affectus peccandi. Si per ignorantiam. Si per necessitatem, uel per industriam crudelitatis malum pro malo ita providentia sacerdotis iudicandum est. Sed tamen praesertim quorundam synodalium decreuerunt, ut nullus perfectius potest penitere, nisi prius emendet; si fieri potest cui deliquerit. Sin autem saltim pauperibus, similis discretionis sententia de minoribus causis. Vnde .iii. aut .ii. siue .i. annos, uel .xl. dies peniteat, ita ut diximus nullus in hac oportunitate melius quam antea damnum restituere. Tunc demum iuxta emendationem confessionis, sic consideratione sacerdotis breuiter penitentia. Sin uero sana sumant.*

⁵¹ He particularly draws upon the Pseudo-Gregorian penitential, the *Capitula Iudiciorum*, and the ninth book of the Collection in Nine Books. He sometimes presents the results of his comparisons under the rubric *in conflictu canonum*. Cf.

the author only vaguely alludes to a ‘Roman synod’, to canons of ‘many tracts’ and to *quorundam synodalium*; the same vagueness and ambiguity that we have also encountered in the Collection in Nine Books.

CRITICISM OF PENITENTIALS IN THE ELEVENTH CENTURY

At around the same time, the eleventh-century reformers of the (pre-)Gregorian era, notably Peter Damian and Atto of St Mark renewed and radicalised the criticism of the Carolingian reformers towards non-authoritative texts.

Peter Damian fulminates in his *Liber Gomorrhianus*, a tract against clerical homosexual practices that was addressed to pope Leo IX (ca. 1051), against the inconsistency and laxness of the penitential canons. In order to support his case, he cites various canons concerning homosexuality taken from Burchard’s *Decretum*.⁵² He then proceeds to demonstrate that the canons lacked the endorsement of church councils or popes:

“Who then fabricates these canons?’ ... ‘It is firmly established, that all authentic canons are either arrived at in venerable synodal councils or were promulgated by the holy fathers, the pontiffs of the Apostolic See. Nor is it permitted to just any man to issue canons; but this privilege belongs to him alone who is seen presiding (*cernitur praesidere*) in the chair of the blessed Peter.”⁵³

On the confusing attributions of the canons he remarked:

“If one should ask the name of the author, one cannot answer with any certainty, since [his name] cannot be uniformly found in the codices. In one place is written “Theodore says”, in another “the Roman Penitential says”, in another “the Canons of the Apostles”. Some are titled in one way, some in another, and since they do not deserve to have a single author (*unum habere merentur auctorem*), without doubt they lose all authority.”⁵⁴

Peter Damian’s comments on the penitentials were part of his general dislike of non-authoritative texts. Not only the penitentials fell victim to his criticism, but also the provisions of provincial councils, as he remarked on the canons of the Council of Tribur (898): “Call your council what you will, but its authority I won’t accept if it is not in harmony with the papal decrees”.⁵⁵ According to Peter Damian, authoritative canons could only be issued by ecumenical councils and, first and foremost, by popes. In addition, each canon ultimately had to be in keeping with the decrees of popes. We should not, however, make too much of his critique, since in some of his later letters he used precisely those canons of Burchard of Worms which he had previously dismissed as non-canonical, notably the provisions of Theodore and the Roman penitential.

A few decades later, cardinal Atto of St Mark, until at least the early 1080s an ardent adherent of the Gregorian cause, likewise disapproved of the widespread use of the Roman penitential in

ibid. II, 73, ed. Fornasari 222: *De illis uidelicet sacerdotibus qui per ignominiam utpote temeritate sua aut pro concubinis aut aestimant pro uxoribus post leuiticam benedictionem diu sibi fruuntur decreuit sancta synodus et in Poenitentiale ac in Conflictu canonum statuta seniorum pleniter inuenitur, quod oporteat eum celeriter conuertere atque diebus omnibus uitae suae poenitere...*

⁵² Peter Damian, *Book of Gomorrah*. An eleventh-century treatise against clerical homosexual practices. Translated with an introduction and notes by Pierre J. Payer (Waterloo 1982) 49–54. Ryan, *Saint Peter Damiani* 29f., demonstrated that Burchard’s *Decretum* was Peter Damian’s main source. See also Detlev Jasper, *Burchards Dekret in der Sicht der Gregorianer*, in: *Bischof Burchard von Worms, 1000–1025*, ed. Wilfried Hartmann (*Quellen und Abhandlungen zur mittelhheinischen Kirchengeschichte* 100, Mainz 2000) 167–198, at 174f.

⁵³ Petrus Damiani, *Liber Gomorrhianus* (ed. Kurt Reindel, MGH *Die Briefe der Deutschen Kaiserzeit* 4, 1, München 1983) 304: *Verumtamen quis istos canones fabricauit? (...) Constat nimirum, quod omnes autentici canones aut in uenerandis synodalibus conciliis sunt inventi aut a sanctis patribus sedis apostolicae pontificibus promulgati, nec cuiquam soli homini licet canones edere, sed illi tantummodo hoc competit privilegium, qui in beati Petri cathedra cernitur praesidere.*

⁵⁴ Petrus Damiani, *Liber Gomorrhianus*, ed. Reindel 304: *Quod si nomen auctoris inquiratur, certum non ualet dici, quia nec potest in variis codicibus uniformiter inueniri. Alibi enim scribitur, Theodorus dicit, alibi penitentialis Romanus dicit; alibi canones apostolorum, aliter hic aliter titulatur illic, et dum unum habere non merentur auctorem, omnem perdunt sine dubio auctoritatem.*

⁵⁵ See Ryan, *Saint Peter Damiani* 141–143.

Rome.⁵⁶ Many of the ideas expressed in the preface of his collection of canons known as the *Breviarium* echo those of Peter Damian's *Liber Gomorrhianus*. In this text, he addresses himself to the unlearned and ignorant clergy of his church, who, prevented by poverty and the unhealthy climate of Rome, were unable to go to the places where they could learn the canons. He claims that the so-called Roman penitential used by his clergy was apocryphal and "composed in a rustic style" (*in rusticano stylo*). He condemns its canons as "fables" upon which "those who do not know the authentic canons rely".⁵⁷ He then quotes a letter of pope Leo I, who had decreed that using apocryphal texts was equal to heresy, and states that canonical provisions need active papal approval, since according to Pseudo-Isidorian doctrine "no council is or will be valid which lacks the authority of this see".⁵⁸ He then proceeds to question the authority of the decrees of provincial councils that can be found in Burchard of Worms' canon law collection, the *Decretum* ("if they are not confirmed by this Church they are not valid except with the agreement of both parties"). And he remarks about Burchard's penitential canons: "Nevertheless, many things there, though true, are attributed to an author falsely; others are plainly false; others are written in the foulest manner...". Thus, Atto decided to compile a collection *ad dandas paenitentias et ad definitionem causarum*, which was intended to supplant the penitentials and that could live up to the expectations of the Reformers. This so-called 'Breviary' was based on papal decretals, chiefly Pseudo-Isidorian ones, and on *concilia transmarina* taken from the *Collectio Dionysio-Hadriana*. Which particular text he had in mind when he declared the Roman penitential apocryphal is unclear. Although it is likely that he was referring to Halitgar's sixth book, the Roman penitential, it is significant that most south Italian or Roman copies of Halitgar's text omit the Roman penitential.⁵⁹ According to Detlev Jasper, Atto's criticism of the Roman penitential might have been inspired by Burchard's giving so much weight to the Roman penitential in the preface of his nineteenth book.⁶⁰ Atto's collection is a long series of sentences derived from the decretals which mainly touches upon clerical matters. The collection hardly contains any canons on incest, theft, or perjury and, therefore, it is doubtful whether Atto's collection was of much use in pastoral care. The *Breviarium* is only preserved in a late eleventh-century codex and it largely remained unnoticed by the compilers of later collections of canons.⁶¹

The negative attitude did not affect the use of older penitentials and the compilation of new ones, since new penitential texts continued to be compiled in the early twelfth century, while earlier peni-

⁵⁶ For Cardinal Atto see Rudolf Hüls, *Kardinäle, Klerus und Kirchen Roms 1049–1130* (Bibliothek des deutschen historischen Instituts in Rom 48, Tübingen 1977) 185.

⁵⁷ Atto of St Mark, *Breviarium*, *prefatio* (ed. Angelo Mai, *Scriptorum veterum nova collectio e Vaticanis codicibus edita* 6, 2, Roma 1832) 60–100, esp. 60f.: ... *factum est ut paenitentiale romanum apocryphum fingeretur et in rustico stylo ut illi qui authenticos canones nesciunt, et litteras non intelligunt, in his fabulis confidant...* For a translation of the preface see Bruce C. Brasington/Robert Sommerville, *Prefaces to canon law books in Latin Christianity. Selected translations, 500–1245* (New Haven/London 1998) 118–121. Note that the title of the *Liber Gomorrhianus* runs "The apocryphal canons in which those who trust are completely deceived."

⁵⁸ Atto of St Mark, *Breviarium*, ed. Mai 61: *Si enim, secundum Iulium papam, nullum ratum est concilium aut erit, quod huius sedis non est fultum auctoritate; nec sine huius sedis auctoritate rata sunt scripta, quibus fieri solent concilia.*

⁵⁹ The Roman manuscripts Roma, Bibl. Vallicelliana T. XVIII (Rome or the vicinity of Rome, s. XI) and Città del Vaticano, Archivio di S. Pietro H 58 (Rome, s. X–XI) only contain excerpts from books I–V, but there are codices from Northern Italy that do contain the P. Pseudo-Romanum, see Kottje, *Die Bußbücher Halitgars van Cambrai und des Hrabanus Maurus* 14–83. Other penitentials that circulated in Rome were the penitential of Vatican, Archivio di S. Pietro H 58; cf. Ludger Körntgen, *Ein italienisches Bußbuch und seine fränkischen Quellen. Das anonyme Paenitentiale der Handschrift Vatikan, Arch. S. Pietro, H 58*, in: *Aus Archiven und Bibliotheken. Festschrift für Raymund Kottje zum 65. Geburtstag*, ed. Hubert Mordek (Freiburger Beiträge zur mittelalterlichen Geschichte. Studien und Texte 3, Freiburg 1992) 189–205; P. Vallicellianum I (Roma, Biblioteca Vallicelliana E. 15 and F. 54, both s. XI); see Hägele, *Das Paenitentiale Vallicellianum* 1, 27–29.

⁶⁰ Jasper, *Burchards Dekret* 180–183.

⁶¹ The influence of the *Breviarium* in reforming circles may have been hampered by Atto's switching to the side of anti-pope Clement III in 1084 and his subsequent excommunication by pope Gregory VII. For the background of Atto's defection from Gregory and Atto's criticism of the pope's appropriation of ecclesiastical property in order to finance his wars against Henry IV, see Ian S. Robinson, *Authority and Resistance in the Investiture Contest. The Polemical Literature of the Late Eleventh Century* (Manchester 1978) 44f.

tentials like Burchard's *Corrector* still circulated in the twelfth century. Whereas some reforming canonists entirely ignored penitential canons, other reformers, for example Bonizo of Sutri, did include them in their collections. Penitential canons were also added to later recensions of Anselm of Lucca's Canon law collection – whose eleventh book on penance was turned into a penitential – to some manuscripts of the Collection in Seventy-Four Titles, and even to Gratian's *Decretum*.⁶²

On the other hand, new texts do reveal a growing awareness of the necessity for proper authoritative attribution of canons. Canon law collections of the reform period, for instance Deusdedit's collection, the Collection in Seventy-Four Titles, do not contain any penitential canons. No penitential is listed in Bernold of Konstanz's tract on the sources of ecclesiastical law.⁶³ As for the penitentials of this period themselves it seems that authority becomes more important. While the canons of the early eleventh-century P. Casinense and of the P. Vaticanum are not attributed to any authoritative source, those of early twelfth-century penitentials like the P. Vallicellianum E. 62 and the P. Vallicellianum C. 6 are.⁶⁴ A similar development had already taken place in the regions north of the Alps, but now it also happened in Italy. An interesting case in point is an anonymous penitential in a south Italian codex which is now preserved in Lucca, of which almost all the canons, even those taken from Burchard's *Corrector*, are attributed to Gregory the Great.⁶⁵ Again, it seems that the compiler claimed false authority for the canons. With the Peter Damian's critique in mind, it is doubtful whether such attributions would have satisfied the Gregorian reformers. They probably would have condemned the rulings as apocryphal. The compilers of penitentials, however, continued to use the old canons and did not turn to decretals or conciliar decrees for their compilations.

CONCLUSION

While the penitentials of earlier traditions solely referred to ancient fathers, later penitentials showed more concern to attribute their canons to specific authorities. From the ninth century onwards compilers and copyists seem to have abandoned anonymous texts and turned to more authoritative (but sometimes apocryphal) ones, for instance the penitentials of Theodore and Bede. Forgery was a useful alternative to enhance the authority of penitentials. We have seen that later Italian texts, notably the Collection in Nine Books and the Collection in Five Books, retained a certain vagueness about authority, like the older texts. The choice of canons and penances was understood to depend on the *discretio* or *providentia* of the priest. This vagueness made the penitential canons liable to criticism from Carolingian and Gregorian reformers. The authority of the penitential canons could not satisfy the Carolingian or the Gregorian reformers: their sense of authority depended on the authority of the lawgiver, on someone who was entitled to enact laws, such as the pope, church fathers, or an assembly of bishops. The Carolingian councils condemned the penitentials because they were of doubtful authority and their canons were discordant. With regard to the authority of the penitentials, the Gregorians gave the critique of the Carolingians a radical turn. More than their Carolingian predecessors, the Gregorian reformers emphasised the role of the pope as the ultimate source of law. To put it in the words of Atto of St Mark, Saint Peter was the goldsmith who could 'prove if gold was genuine or not': even if the authority of a penitential was ascertained (Bede, Theodore, 'Roman', etc.), then its authority could not rival that of papal decretals or canons of the ecumenical councils. They objected to the use of penitential canons either because they were apocryphal or, if not, because authors such as Cummean and Theodore simply did not have enough authority to compete with popes or councils.

⁶² Johannes Laudage, *Gregorianische Reform und Investiturstreit* (Erträge der Forschung 282, Darmstadt 1993) 6–8, remarks that even the most fervent Gregorians disagreed on the authority of canon law.

⁶³ Bernold von Konstanz, *De fontibus iuris ecclesiastici*, ed. Stöckly 120–186.

⁶⁴ P. Vallicellianum E. 62 (ed. Friedrich W.H. Wasserschleben, *Die Bussordnungen der abendländischen Kirche*, Halle 1851) 550–566; P. Vallicellianum C. 6, ed. Schmitz 1, 350–388. Many of their canons and rubrics were taken from the Collection in Five Books. P. Casinense, ed. Schmitz 1, 397–432.

⁶⁵ This penitential, which has recently been discovered by Roger Reynolds, can be found in the early twelfth-century codex Lucca, *Biblioteca Statale* 1781, fol. 6r–8v.

I have argued that the criticism of penitential handbooks only partially influenced the compilers and users of these texts. The reforming bishops of the Carolingian and Gregorian periods were more concerned with the ideological framework and less with the compilation of new practical texts. Except for Halitgar of Cambrai, the reformers failed to compile convenient handbooks for confessors which could compete with the penitentials or that covered the same variety of subjects as these texts. Still, the compilation of new penitentials and the copying of old ones suddenly stopped at around 1150 and they gradually disappeared from the scene. They gave way to new handbooks that were composed in a different style, although even these *summae confessorum* still contained a good deal of penitential canons which, although derived from Burchard's and Gratian's *Decreta*, ultimately went back to the old penitentials.⁶⁶ Whether this change was effected by the continuous criticism of these texts or whether the reasons for this change elsewhere needs to be investigated in the future.

⁶⁶ See for instance the fifth book of the penitential of Robert of Flamborough compiled between 1208–1215: Robert of Flamborough, *Liber poenitentialis* (ed. J.J. Francis Firth, Robert of Flamborough, canon-penitentiary of Saint-Victor at Paris, *Liber Poenitentialis*. A critical edition with introduction and notes, Toronto 1971) 203–278. The various interrogatories are clearly dependent on Burchard's *Corrector sive Medicus*. On the penitential tariffs in later ages see Mary C. Mansfield, *The Humiliation of Sinners: Public Penance in Thirteenth-Century France* (Ithaca 1995) 18–91; Thomas N. Tentler, *Sin and Confession on the Eve of the Reformation* (Princeton 1977) 221–332.

